163-709

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~889.~~ 106

THE UNITED STATES, APPELLANT,

vs.

CHARLES AULICK, ADMINISTRATOR OF HAMPTON AULICK, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 13, 1892.

(15016.)

portant that the rule invoked should be applied to them; for if it be held that defendant in error is not within the protection of the rule by reason of the fact that her adversary has taken a dismissal, this method of securing delay without risk will soon become so common as to practically abrogate the rule.

It is submitted that the rule in question should constitute as complete a bar to the right to dismiss after the mischief intended to be prevented has occurred as the pendency of a cross-complaint or counter-claim is a limitation upon the general right of a plaintiff to dismiss his suit in a *nisi prius* court. The rule seems to a litigant who is unreasonably and vexatiously prevented from collecting his judgment a substantial right, the exercise of which ought not to depend upon the consent or be subject to the control of his adversary; and if this is not a proper case for the enforcement it is not easy to conceive of one which would be. Courts are vigilant in preventing litigants from abusing their process and in punishing them when they have done it. To stay execution of a judgment for four years and a half, as has been done in this case, for the purpose of delay merely, is surely an indefensible and oppressive abuse of the right of appeal. It is quite enough, it is submitted, that plaintiff in error should enjoy, as it does, peculiar and exceptional privileges over other litigants in the matter of bringing judgments here for review which they control. When once here under this almost exclusive right, certainly it should not be exempted from the operation of the rules of this tribunal.

Most respectfully submitted.

R. T. McNeal,
For Defendant in Error.

163-709

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CHARLES AULICK, ADMINISTRATOR OF HAMPTON AULICK, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 13, 1892.

(15016.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 389.

THE UNITED STATES, APPELLANT,

vs.

CHARLES AULICK, ADMINISTRATOR OF HAMPTON AULICK, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

HAMPTON AULICK
v.
THE UNITED STATES. } 15626.

I.—*Petition filed April* 21, 1887.

To the honorable the judges of the Court of Claims:

The petition of Hampton Aulick respectfully shows to your honors:

That he is a citizen of the United States and an officer of the Navy thereof, to wit, a surgeon.

That on the 3d day of November, 1882, he reported on board the U. S. S. "Ajax," in obedience to the following order:

NAVY DEPARTMENT,
BUREAU OF NAVIGATION AND OFFICE OF DETAIL,
Washington, October 26, 1882.

SIR: On the reporting of your relief, Passed Assistant Surgeon P. S. Nash, on the 1st of November next, you will regard yourself detached, from the "Dispatch," and will proceed without delay to Norfolk, Va., and report to Commodore Mayo for duty on board the iron-clads at City Point, Va., as the relief of Passed Assistant Surgeon C. A. Siegfried.

This employment on shore duty is required for the public interests, and such service will continue until 26th October, 1884, unless it is otherwise ordered.

By direction of the Secretary:

(Signed) J. G. WALKER,
Chief of Bureau.

2 That your petitioner served on said vessel until the 10th day of May, 1884, when he was detached therefrom.

That during the said period of his service the said vessel was lying in the James River, off City Point, Va., in company with several other iron-clad vessels of the Navy; that the said iron-clads were under the command, first, of First Lieutenant J. A. Chesley, and afterward of Commander D. W. Mullan; that said officers had their quarters on board the said "Ajax," which vessel was in commission, with its pennant flying, during the whole period of his service thereon.

That your petitioner had his quarters on the said "Ajax," and was obliged to keep up his mess thereon and to wear uniform, and that his duty comprised the medical care of the officers and men (about one hundred in number) upon the said vessel and other iron-clads.

That your petitioner for the whole period of his said service received only the shore pay provided by section 1556 of the Revised Statutes for his grade, which was then that of passed assistant surgeon, whereas your petitioner says that he should have received the sea pay of his said grade for the whole period of his said service; wherefore he prays judgment against the United States in the sum of three hundred and fifty dollars ($350.00).

Your petitioner says that he is the sole owner of his claim, and has never transferred the same, or any part of it, to any person; that he is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; that he has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government.

HAMPTON AULICK,
By JOHN PAUL JONES, *Att'y.*

John Paul Jones, being first duly sworn, on oath says that he is the attorney of the petitioner named in the foregoing petition, and that the facts therein stated are true to the best of his knowledge and belief.

JOS. W. AMAN,
Commissioner Court of Claims.

3 II.—*Traverse filed July* 8, 1887.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBT. A. HOWARD,
Assistant Attorney-General.

4 III.—*Findings of fact and conclusion of law filed January* 11, 1892.

Charles Aulick, administrator of Hampton Aulick, *v.* The United States.

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

1. Since the bringing of this suit the claimant has died. His estate is now represented by Charles Aulick, administrator.

2. Hampton Aulick was a passed assistant surgeon in the Navy during the period from November 3, 1882, until May 10, 1884.

3. On the former date he reported on board the U. S. S. "Ajax," and served there until May 10, 1884, in obedience to the following order:

NAVY DEPARTMENT,
BUREAU OF NAVIGATION AND OFFICE OF DETAIL,
Washington, October 26, 1882.

SIR: On the reporting of your relief, Passed Assistant Surgeon P. S. Nash, on the 1st of November next, you will regard yourself detached

from the "Dispatch" and will proceed without delay to Norfolk, Va., and report to Commodore Mayo for duty on board the iron-clads at City Point, Va., as the relief of Passed Assistant Surgeon C. A. Siegfried.

This employment on shore duty is required for the public interests, and such service will continue until 26th October, 1884, unless it is otherwise ordered.

By direction of the Secretary:

J. G. WALKER,
Chief of Bureau.

4. Decedent performed the duty assigned him until May 10, 1884, when he was detached. Said vessels were public vessels of the United States, and during said period were afloat in navigable waters of the sea. During said period decedent received only the pay of an officer of his grade on shore duty, and was not allowed a ration or commutation therefor.

5. On the date specified the following order was made:

AUGUST 3, 1887.

Vessels in commission, lying in port, held in reserve for sea service, and reduced in complement, will be considered by the Department as on special shore service, and the officers attached thereto on shore duty.

Whenever the complement of such vessel is filled she will be considered as on sea service and her officers on sea duty until the completion of the cruise or the reduction of the complement, when she will again be considered as on special shore service and her officers on shore duty.

R. W. THOMPSON,
Secretary of the Navy.

6. The vessels to which decedent was assigned were lying in port, held in reserve for sea service, and reduced in complement.

7. During the time he was attached to this vessel decedent was required to have his quarters on board, to mess there, and was obliged to wear his uniform, and was not permitted by the rules of the service to live with his family.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court determines as a conclusion of law that the claimant is entitled to $303.56, being the difference between his sea pay and shore pay for the period set forth in the foregoing finding.

5 IV.—*Opinion of the court.*

NOTT, J., delivered the opinion of the court.

This is an action brought by a naval officer to recover sea pay while on board the monitor "Ajax," she at the time being moored in the James River near Richmond.

The opinion of the court in the case of "Corwyne" (24 C. Cls. R., 104) says of this identical vessel, while lying in this identical place, "the 'Ajax' was a vessel belonging to the United States, employed by authority of law and being at sea in the navigable waters of the United States." "The

vessel to which the claimant was assigned was lying in port, held in reserve for sea service, and reduced in complement," and was "in a state of absolute repose, performing no function or duty."

The only point raised by the counsel for the defendants is that the case does not come within the decisions in Symonds and Strong (120 U. S. R., 46; 125 id., 656) because in one of those cases the service which the ship was rendering was that of a training ship, and in the other that of a receiving ship. Here it is insisted that the ship was not in service.

There is a distinction between rendering service and being in service. An officer sleeping in his berth is not rendering service, but is nevertheless in service. An officer on "shore leave" for a few hours while his vessel is in a foreign port, is in sea service, though not rendering service. The sea pay does not stop because the officer chances for the moment to be on dry land. And it is so with a vessel. Ships of war in time of peace are for the greater part of the time in a condition of idleness. They sail somewhere and do nothing; they sail somewhere else and again do nothing; they return home and await orders. A ship of war may pass her entire life in a condition of readiness to serve, but of never serving.

The opinion in the Corwyne case does indeed say that the monitors, of which the "Ajax" was one, "were not in any service." The words have not the significance in that case which they have in this, and it is clear from the context and the whole tenor of the opinion that they were used as synonymous with being engaged in service or at the time rendering service. A ship of war afloat, manned, in a serviceable condition, and able to proceed to sea if ordered so to do, is in service, though she may need more stores and more men to make her sea service effective.

It was also said in the opinion in the Corwyne case—

It is not the mere location or condition of the ship that determines the right of pay, but the condition of the ship with reference to the sea, qualified by the further condition of being subjected to such restrictions, regulations, and requirements as are incident to service at sea.

This language is not strictly a decision favorable to the present case, inasmuch as judgment went against the former claimant for the reason that he had failed to show that he was subjected to such restrictions, regulations, and requirements as are incident to service at sea. But in the present case the claimant has complied with the second condition and the court now adopts the language as its decision and as accurately expressive of its opinion in this case.

The judgment of the court is that the claimant recover of the defendant the sum of $303.56.

In the case of John Q. Lovell, the facts being substantially the same as those in this case, judgment will also be entered for $514.52.

6 V.—*Judgment of the court.*

CHARLES AULICK, ADMR. OF HAMPTON AULICK,
vs.
THE UNITED STATES. } 15626.

At a Court of Claims held in the city of Washington on the 8th day of February, A. D. 1892, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Charles Aulick,

administrator of Hampton Aulick, deceased, do have and recover of and from the United States the sum of three hundred and three dollars and fifty-six cents ($303\frac{56}{100}$).

BY THE COURT.

7 VI.—*Application for and allowance of appeal.*

CHARLES AULICK, ADMR. OF HAMPTON AULICK, dec'd,
vs.
THE UNITED STATES. } 15626.

From the judgment rendered in the above-entitled cause on the 8th day of February, 1892, in favor of the claimant, the defendants, by their Attorney-General, on the 22d day of March, 1892, make application for and give notice of an appeal to the Supreme Court of the United States.

JOHN B. COTTON,
Asst. Atty. General.

Filed and allowed in open court March 22, 1892.

WILLIAM A. RICHARDSON,
Chief Justice.

8 In the Court of Claims.

CHARLES AULICK, ADMR. OF HAMPTON AULICK, deceased,
vs.
THE UNITED STATES.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the judgment of the court, of the application for an allowance of appeal to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this 7th day of April, 1892.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

9 (Indorsement on cover:) Case No. 15016. Term No. 389. The United States, appellant, vs. Charles Aulick, administrator of Hampton Aulick, deceased. Court of Claims. Filed April 13, 1892. Supreme Court U. S., clerk's office. Received Apr. 13, 1892.